Nos. 01-639, 01-662

DEC 26 2001

In The
Supreme Court of the United States

MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL, ET AL.,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET. AL.,
Respondents.

OFFICE OF COMMUNICATIONS, INC.;
UNITED CHURCH OF CHRIST,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET. AL.,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION
FOR THE STATE BROADCASTERS ASSOCIATIONS

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QUESTION PRESENTED

Whether the court of appeals correctly vacated the Federal Communications Commission's so-called "Equal Employment Opportunity Rule" because it was a race-based classification that violated the Fifth Amendment and the unconstitutional provisions could not be severed to leave a rule that fulfilled its intended purposes.

CORPORATE DISCLOSURE STATEMENT

Respondents State Broadcasters Associations, with the exception of the Georgia Association of Broadcasters, are all non-profit, incorporated trade associations comprised of broadcast station members. The Georgia Association of Broadcasters is an incorporated, for-profit trade association. None of the State Associations has issued any share or debt securities to the public. No parent company or publicly-held company has an ownership interest in any of the State Associations.

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STATEMENT OF THE CASE

1. The court of appeals correctly ruled that the FCC's so-called "equal employment opportunity" rule (the "EEO rule") was a race-based classification that violated the Fifth Amendment. *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, *reh'g & reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001) (Pet. App. 1a). Neither the Federal Communications Commission ("FCC") nor the United States of America has requested review of that ruling. Indeed, in the wake of the court of appeals' decision, the FCC has adopted a Second Notice of Proposed Rulemaking seeking comments on a proposed new EEO rule. *See* Press Release, Federal Communications Commission, FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable (December 13, 2001), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0117.html. By initiating the rulemaking, the FCC indicates that it can formulate a new rule that will serve the agency's purposes and comply with the Constitution.

2. The Petitioners, most of which were intervenors in the court of appeals, do not seek review of the Fifth Amendment issue that was the focal point of the parties' arguments and the court of appeals' decision below. Rather, they present to this Court an issue relating to the standards for a facial challenge to the EEO rule, an issue that was never raised by any party prior to the court of appeals' initial ruling and was raised only cursorily on rehearing in the court of appeals by one of the Petitioners.

3. The facts leading to the court of appeals' decision are as follows. In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998), the court of appeals held that an earlier version of the FCC's EEO rule was an unconstitutional race-based classification because it pressured broadcasters to hire employees based on race and

could not survive strict scrutiny. Neither the FCC, the United States, nor any other party sought review by the Court.

On remand of *Lutheran Church*, the FCC initiated a rule-making proceeding to remedy the constitutional flaws identified by the court of appeals. In response, the State Associations submitted a proposal to the FCC that would have provided for broad outreach in recruitment to the entire public, without any reference to the race, ethnicity or gender of applicants or employees. The FCC rejected this proposal and adopted instead a new EEO rule that not only re-imposed on broadcasters many of the same race, ethnicity and gender-based affirmative action and reporting requirements contained in the prior rule, but also added new burdensome requirements. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, MM Docket Nos. 96-16, 98-204, 15 F.C.C. Rcd. 2329 (2000) (the "*EEO R&O*") (Pet. App. 49a).

The exclusive focus of the new EEO rule was on "women and minorities", *not*, as Petitioners suggest, on the "entire community." Pet. 17. Race, ethnicity and gender were the *only* traits that the new rule referenced in the recruitment procedures it imposed on broadcasters. *See EEO R&O* at ¶¶ 78-9, 104 (Pet. App. 113a-117a, 134a); 47 C.F.R. § 73.2080(d)(2) (Pet. App. 43a-44a). The new EEO rule was concerned only with certain classes of people on whom the FCC chose to bestow a special status – classes defined by racial, ethnic and gender classifications. *See, e.g., EEO R&O* at ¶ 113 (Pet. App. 138a); 47 C.F.R. § 73.2080(c)(2)(iii), (xii) (Pet. App. 39a-40a). The rule did not require stations to maintain data reflecting whether recruitment sources generated applicants who were, for example, members of particular religious groups, or who were from particular socioeconomic backgrounds; rather, it required the maintenance of data with respect *only* to race, ethnicity and gender in connection with Option B. Moreover, the

FCC warned that it was prepared to investigate broadcasters that reported "few or no" job applications from women or minorities. *See, e.g., EEO R&O* at ¶ 120 (Pet. App. 142a).

4. The court of appeals correctly ruled that the new EEO rule pressured broadcasters into recruiting on the basis of race, and was therefore a race-based classification that violated the equal protection component of the Fifth Amendment's Due Process Clause. *MD/DC/DE Broadcasters*, 236 F.3d 13 (Pet. App. 1a). The court made this decision in the context of its experience with the Commission's long history of pressuring broadcasters to induce conduct desired by the agency, including *sub silentio* pressures and "raised eyebrow" regulation. *Id.* at 19 (quoting *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)) (Pet. App. at 10a-11a). In these circumstances, the FCC's warning about investigations of broadcasters that reported "few or no" applications from women or minorities was "a powerful threat, almost guaranteed to induce the desired conduct." (Pet. App. 11a).

The court of appeals correctly held that the unconstitutional provisions of the rule could not be severed and that the entire EEO rule should therefore be vacated. *MD/DC/DE Broadcasters*, 236 F.3d at 22-23; 253 F.3d at 733-736 (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)) (Pet. App. 17a-18a; 21a-26a). The court did not accept the suggestion of many of the Petitioners to sever the unconstitutional portions of the rule by "cut[ting] out all references to 'minorities' in the regulation, thereby leaving the regulation intact with respect to women," because the Commission's intention was always to treat women and minorities identically. *Id.* (Pet. App. 18a). As for Option B of the rule, since one of the FCC's expressed purposes in adopting the rule was to afford broadcasters broad flexibility, the court correctly found that the rule "could not, without Option B, sensibly serve the goals for which it was designed." *Id.* (Pet. App. 22a; *see* 21a-26a).

5. The FCC and the United States did not question the State Associations' right to bring a facial challenge to the rules in the court of appeals. Indeed, the only mention by any party of any supposed problem with such a challenge was a short discussion in a petition for rehearing filed by the Office of Communication, Inc., United Church of Christ ("UCC"). UCC Petition for Rehearing or Rehearing *En Banc* at 18-19.

REASONS FOR DENYING THE PETITION

Neither the United States nor the FCC has sought review of this case. The petitions for writs of certiorari should be denied because (1) the court of appeals' decision does not interfere with the FCC's ability to fulfill any statutory mandate it may have; (2) the case has no necessary impact on the ability of other agencies of the federal government to enforce their regulations concerning employment discrimination or data collection; (3) the court of appeals correctly applied this Court's precedent in finding the FCC rule invalid on its face; (4) the severance issue requires an inquiry into specific and peculiar facts relating to the FCC's intent and the structure of the rule in question that is not appropriate for review by this Court; and (5) Petitioners' arguments that the case is related to disposition of *Adarand* are moot because the Court dismissed the writ of certiorari as improvidently granted in that case. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom. Adarand Constructors, Inc. v. Mineta*, 70 U.S.L.W. 4025 (U.S. Nov. 27, 2001) (No. 00-730). Moreover, the pendency of the proceeding initiated by the FCC's Second Notice of Proposed Rulemaking to fashion new EEO rules consistent with the court of appeals' decision, makes review by the Court of the old rules unnecessary.

I. THE FCC HAS INITIATED A RULEMAKING TO IMPLEMENT ITS "EQUAL OPPORTUNITY" OBJECTIVE IN A CONSTITUTIONAL MANNER AND IS NOT HINDERED IN ITS ABILITY TO PURSUE ANY LAWFUL MANDATE.

Rather than seeking review of the court of appeals' decision, the FCC has adopted a Second Notice of Proposed Rulemaking seeking comments on new EEO rules proposed in response to the court of appeals' decision. *See* Press Release, Federal Communications Commission, FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable (December 13, 2001), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0117.html. The FCC apparently believes it can promulgate a new rule that both serves its purposes and is consistent with the court of appeals' decision. Therefore, any review by this Court is inappropriate.

The FCC's determination to adopt a new rule also makes it premature, to say the least, for Petitioners to argue that the FCC cannot meet its statutory obligations or that the court of appeals' decision somehow "*sub silentio*" struck down Section 334(a) of the Communications Act, 47 U.S.C. 334(a). The FCC's initiation of new EEO rulemaking presupposes that the agency can fulfill any statutory mandate the agency may have, consistent with the court of appeal's decision.

II. THE COURT OF APPEALS' DECISION DOES NOT INTERFERE WITH THE ABILITY OF OTHER GOVERNMENT AGENCIES TO ENFORCE REGULATIONS.

Contrary to the claims of the Petitioners, the court of appeals' decision has no necessary implications for the ability of other agencies to enforce their rules concerning

employment discrimination or data collection. The United States would surely have sought review if, as Petitioners suggest, the court of appeals' decision broadly undercut administrative agencies' ability to enforce their own regulations. The United States was correct when it told the court of appeals that the FCC's regulations were different from hiring regulations of other federal agencies because of the *pressure* that the FCC is able to impose on its licensees. *See generally Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 436-437 (1963) (quoting commentators stating, the "licensing power of the FCC...hangs like a constant Damocles' sword over broadcasting" and that the FCC's informal powers resulted in "regulation of programming by raised eyebrow"). As the United States told the court of appeals:

> The licensing authority of the FCC is indeed a powerful tool; the FCC exerts a great deal of influence over holders of broadcast licenses and can revoke a license where a licensee fails to comply with the agency's rules and policies.... Under the Communications Act, the FCC has the responsibility of controlling radio and television channels, and the power to license their use for limited periods of time. The FCC establishes qualifications for broadcasters, can compel the disclosure of certain information from them, and may grant or deny license applications in the public interest. The FCC may alter, suspend, or revoke a license subject to certain procedural safeguards. Indeed, a decision by the FCC to revoke a station's license will essentially render the station inoperable and likely put the broadcaster out of business.

Response of the United States to Petitions for Rehearing and Petitions for Rehearing *En Banc*, at 9 (citations omitted).

The court of appeals ruled that certain aspects of the EEO Rule provided "evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them." *MD/DC/DE Broadcasters*, 236 F.3d at 19 (Pet. App. at 11a). As the United States explained below, this concern would not apply in the context of other agency programs, and the court of appeals' decision therefore does not have clear precedential value concerning those programs. Response of the United States to Petitions for Rehearing and Petitions for Rehearing *En Banc*, at 9-10.

III. THE COURT OF APPEALS' INVALIDATION OF THE EEO RULE ON ITS FACE COMPORTS WITH COURT PRECEDENT AND PETITIONERS HAVE IDENTIFIED NO CIRCUIT COURT SPLIT ON THIS ISSUE REQUIRING RESOLUTION.

The petitions presented to this Court offer no good reason for the Court to review the court of appeals' invalidation of the EEO rule. While both petitions cite *United States v. Salerno*, 481 U.S. 739, 745 (1987), the mere invocation of that decision does not show that the court of appeals' decision conflicts with this Court's precedent on standards for facial challenges. *See* Minority Media & Telecommunications Council, et al. Pet. at 14; Office of Communication, Inc., United Church of Christ Pet. at 15. Indeed, as this Court stated in *City of Chicago v. Morales*, "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself...." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). The Court went on to say that it is "doubtful" that it "would be appropriate for federal courts to apply the *Salerno* standard in some cases." *Id.*

The court of appeals was squarely within the bounds of Court precedent when it concluded that the EEO rule would pressure broadcasters to make employment decisions on the basis of race because of the overarching power the FCC has over licensees and the requirements of the rule itself. The court of appeals recognized that the FCC, through its licensing authority, wields the ultimate power of "life or death" over broadcasters. From this, the court of appeals properly concluded that the FCC's imposition of the EEO rule inherently pressured broadcasters to engage in unconstitutional discrimination in order to comply with the rule and to avoid investigation. This does not contradict Court precedent in any respect.

The petitions for review disagree with the court of appeals' decision and attempt to alchemize their disagreement into a facial challenge issue. While they are correct to assert that striking down a statute or regulation on a facial challenge is "strong medicine," this Court has not hesitated to dispense such a dose in the face of constitutional maladies such as those diagnosed by the court of appeals in this case. The court of appeals was not required to engage in intellectual acrobatics to envision a marginal instance where the rule might not cause an employer to employ race as a factor in employment decisions. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (using as its standard the "large fraction of the cases in which [the law] is relevant"). *See also Bigelow v. Virginia*, 421 U.S. 809, 817 (1975) (holding a statute invalid because the facts well illustrate "the statute's potential for sweeping and improper applications") (citation omitted). Because there is no conflict with Court precedent and the petitions have not identified any split within the circuit courts on this issue, there is no cause to grant review of the issue presented by Petitioners.

IV. THIS COURT DOES NOT GRANT CERTIORARI TO REVIEW THE SPECIFIC EVIDENCE AND FACTS NECESSARY TO A DISPOSITION OF THE SEVERANCE ISSUE IN THIS CASE.

The requests for review should also be rejected because the issue presented turns on the peculiar facts relating to the FCC's intent and the structure of the EEO rule and the Court does not grant certiorari to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.") The legal standard for whether severance is appropriate is established by *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988), as explained by the court of appeals: "[w]hether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters*, 236 F.3d at 22; 253 F.3d at 733-734 (Pet. App. 17a, 21a-22a). The question presented by Petitioners can be resolved only by examining, as the court of appeals correctly did, the specific purposes and structure of the EEO rule and other indicia of the FCC's intention. The court of appeals properly focused, for example, on the FCC's expressed purpose to afford smaller broadcasters broad flexibility to tailor their own programs, and whether a severed rule could still sensibly serve that purpose. *MD/DC/DE Broadcasters*, 236 F.3d at 22-23 (Pet. App. 22a). Review on the question presented by Petitioners would require the Court to review these particular and correct determinations, and is not warranted.

V. THE COURT'S DISMISSAL OF *ADARAND CONSTRUCTORS, INC. v. MINETA* RENDERS MOOT PETITIONERS' ARGUMENTS RELATING TO *ADARAND'S* DISPOSITION.

Petitioners' attempt to align this case with the Court's review of *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom. Adarand Constructors, Inc. v. Mineta*, 70 U.S.L.W. 4025 (U.S. Nov. 27, 2001) (No. 00-730), fails for at least two reasons. First, the Court's dismissal of *Adarand* disposes of Petitioners' argument that this case should be held pending a decision on the merits in that case. Second, the issue presented for review here had no relation to the issues initially accepted for review in *Adarand*. At issue in *Adarand* were the particularized standards of the Department of Transportation's Disadvantaged Business Enterprise program and the implementation of those particularized standards – and, most importantly, whether those standards and that implementation were consistent with the Fifth Amendment. Petitioners here have not presented *any* issue concerning the Fifth Amendment. Rather, they have posed a question about the nature of facial challenges to administrative decisions.[1]

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[1]For the same reason, the supposed conflict mentioned by the UCC in its petition (at 27-28) is of no significance. The alleged conflict relates to whether so-called recruitment "outreach" requirements violate the Fifth Amendment, and this has nothing to do with the issue presented here concerning facial challenges to regulations. In any case, as the court of appeals explained, there is no conflict on the Fifth Amendment issue between its decision and those of other circuits. *MD/DC/DE Broadcasters*, 236 F.3d at 20 (Pet. App. 12a-13a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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